United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES BUSIGO-CIFRE,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of New York

Appellant's Brief

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UNITED STATES OF AMERICA,

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-against-

CHARLES BUSIGO-CIFRE,

Appellant

STATEMENT PURSUANT TO RULE 28

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court, Southern District of New York (the Honorable Charles M. Metzner), whereby the appellant above named was convicted under the first count of the indictment herein, for a conspiracy to violate the narcotic laws, in effect, at the relevant dates the predicate statutes then being found in 21 U.S.C. 173, 174 and superseded thereafter by Section 801, of U.S.C. et. seq., October 27, 1970.

Originally the appellant was not only indicted under the first count for a conspiracy, but was also indicted under the fifth count for a substantive violation of the aforementioned statutes. The jury acquitted the appellant under this count. As a consequence of the conviction, the appellant was sentenced to a jail term of ten (10) years.

QUESTIONS PRESENTED

(1) Was the evidence sufficient to support appellant's conviction for conspiracy as charged in the first count?

(2) Was the appellant a member of an overall conspiracy as charged in the indictment or did the government's proof indicate that there were multiple conspiracies?

(3) Was the appellant denied due process of law, as well as equal protection of the law, under the 5th Amendment to the United States Constitution where the jury acquitted the appellant of the substantive counts but nevertheless convicted him under the conspiracy count, the same evidence underlying both counts?

STATEMENT OF FACTS

The government's case against twelve of the defendants named in this indictment did not result in the conviction of all the defendants; eight (8) of the defendants were found guilty of one or more of the counts charged in the indictment, four (4) were completely acquitted. The appellant was acquitted of committing the substantive acts, as embraced in the fifth count of the indictment but was convicted under the first count charging conspiracy.

A. THE GOVERNMENT'S CASE AGAINST THE APPELLANT CIFRE

The government's principal witnesses whose sordid past were amply established by government counsel as well as defense counsel, were Miguel Rodriguez and Ramîro Gonzalez Infante. Infante testified and was addressed as Gonzalez.

Rodriguez testified that he was forty-three (43) years old and was convicted in January 1971 for a federal narcotics offense receiving a ten (10) year jail term (A1, A2).* He intended to ask for amnesty and he understood that the government would let the authorities know of his services to the prosecution (A2, A3). Since 1964 Rodrigue. knew Gonzalez. In 1970 he joined with Gonzalez in a narcotics enterprise (A3, A4). Gonzalez told Rodriguez, that 45 kilos of heroin were brought from Florida and that Rodriguez should ferret customers to dispose of the heroin (A4, A5). Gonzalez introduced Rodriguez to Juan Ortega, who was a defendant (A5). Embarking on this venture, Rodriguez spoke to Juan Sifori at Gonzalez uncle's house. Sifori was interested in getting a transfer of the jeroin telling him he had two buyers (A6, A7). These customers were described as "Italian friends" (A7, A8). Rodriguez ultimately met the "Italian customers" and subsequently learned that they were undercover agents (A8, A9).

Rodriguez also met a person named Prada, known to him as "El Gallego". He knew him since 1969 (A9, A10). Prade acted as the interceptor when Rodriguez met the two "Italians" introduced to him as "Frankie" and "Tommy" (A10).

Ultimately, the two "Italians" arrested Rodriguez (A11). In transacting with the agents, Rodriguez arranged to give them a sample of heroin at Prada's gas station (A11).

The appellant CIFRE, was the previous owner of that gas station (A12).

Rodriguez continuing his testimony described how he obtained a kilo of heroin from Ortega while waiting at an apartment of a co-conspirator named Infeista for the delivery (A14-A16).

*( ) This refers to the pagination of the appendix furnished by the appellant.

This witness also described his meeting with other participants in narcotic transactions and described the preparation of the heroin for sale during March and April 1970 (A17-A21).

Following the sale to the agents, Rodriguez spoke to various people including the appellant (A24). Rodriguez described that his customers were late payers (A25).

In regard to the appellant, Rodriguez knew him since 1969, having met him at Prada's gas station (A25). The appellant told Rodriguez that he would be interested in purchasing heroin from the Rodriguez-Gonzalez enterprise; that he previously bought heroin from Prada but was dissatisfied in dealing with Prada (A26). Prada also stated to the witness that the appellant was one of his two "customers" (A27). Prada also told this witness that he preferred that Rodriguez deal with the appellant directly (A28).

The appellant spoke to Rodriguez telling him that he would deal directly with him. Rodriguez agreed to sell him a half a kilo for $9,500 (A28, A29). This transaction according to the government's witness was finalized at Prada's gas station. In this transaction the appellant directed the delivery to a third person to whom the witness was introduced (A29). There was also a second sale to CIFRE, according to this witness. However, Rodriguez did not receive the entire payment underlying this transaction; rather the appellant through Prada made installment payments (A30, A31).

This witness also described that heroin was stored at Prada's apartment and gas station describing how it was secreted at the gas station (A32).

Continuing in this enterprise, Rodriguez dealt with a co-defendant known as Echevarria whom he knew since 1962 or

1963 (A33). Echevarria who was acquitted also bought from the Rodriguez/Gonzalez partnership (A32-A35). However, Echevarria was a delinquent payer (A35, A36). In describing his efforts to collect from Echevarria, Rodriguez spoke to the appellant CIFRE about Echevarria's defaults (A37). The appellant allegedly told the witness that he would pay $2.000 of Echevarria's debts, leaving a balance of $8,500, which the appellant said he would not pay (A37).

The other principal witness offered by the government was Ramiro Gonzalez Infante, a partner of Rodriguez. He testified that he was thirty-two (32) years of age and was previously convicted of a firearms charge in Puerto Rico as well as a narcotics charge later (A86). Prior to the narcotics conviction, he jumped bail (A86, A87). Having pled guilty to the narcotics charge he received two ten (10) year concurrent jail terms (A87). While awaiting sentence on those charges he spoke to a guard at jail about escaping (A87).

Both before and after receiving the ten (10) year jail terms, he cooperated with the government (A88). Thereafter his jail term was reduced to six (6) years (A89).

In 1961 Gonzalez met the co-defendant Ortega (A89). In March 1970 he had various discussions with Ortega about narcotics (A89, A90). He related that Ortega told him that he had narcotics in New York and invited him to participate with him in the disposal of the narcotics, the proceeds to be divided equally (A90). Gonzalez accepted the offer.

Gonzalez described his trips to New Jersey and New York and his introduction into the enterprise (A91-A93). Thus he described his meeting with Ortega's sister and brother-in-law at their house in New Jersey, and having been shown Ortega's inventory of heroin consisting of 45 kilos (A93).

Gonzalez with Ortega went to his aunt's house in New York and then went to Infiest's house (A95, A96). He described how Infiesta asked him to speak to Ortega about reducing the price of heroin he would buy (A96-A99).

Gonzalez also visited Prada's gas station (A97).

Gonzalez played a major role in the disposal of the 45 kilos of narcotics between March and April of 1970 (A99, A100). During this period he made various trips to Florida and also delivered money (A100, A101).

Gonzalez described how after the sale to the agents on March 13, 1970 his partner Rodriguez took a half a kilo of heroin to Echevarria's grocery or market. Arriving there, Rodriguez entered the market with the heroin, leaving this witness to wait in the car (A104). While waiting this witness saw Echevarria leave the market; the witness then entered the market and joined Rodriguez who told him that Echevarria was to return with money, which apparently was a payment for a sale (A104). It developed that Echevarria disappointed them; Gonzalez saw him a week later and the defendant introduced him to Echevarria (A104-A105).

According to this witness the appellant told him that Echevarria sold drugs for him and he made a lot of money with Echevarria (A105). That the "property and papers" for Echevarria's grocery were in his possession and the appellant asked Gonzalez to give Echevarria an opportunity to pay. The appellant also allegedly told this witness that he would pay if Echevarria didn't (A105, A106).

When Echevarria continued in his defaults, Gonzalez reminded the appellant of his guarantee; the appellant however, told Gonzalez that he was not ready to make good for

Echevarria, adding that he would go with him to Echevarria's market to collect the money (A108). At the market, Echevarria's wife gave the witness a bag containing what the witness thought was a sufficient amount of money to cover Echevarria's debt, (A108).

This witness went with the appellant to a bar where the witness asked a person named "Caballito" to count the money that was given to him in the bag from Echevarria's wife (A108, A109). The count showed that very little money was given (A109). Finally, this witness told the jury that Echevarria never paid the balance (A109).

On March 12, 1970 this witness spoke to the appellant at Prada's gas station and offered to sell him heroin. The witness explained to the Court that he knew the appellant was engaged in heroin trafficking and the witness claimed that he told the appellant that he could give him a better quality of the narcotic and better terms (A143). Later at a bar, the appellant told the witness that he would buy from him but at a lower price, asking the witness whether he could sell him a quantity for $18,000 indicating that if so, he would deal witn him (A113, A114).

At a third meeting with the appellant, the witness testified that he agreed to sell the appellant a half a kilo and he and the appellant arranged for a meeting the following day where the appellant would identify a man who would accept delivery of it (A114, A115).

On March 13, 1970 the following day, the witness met the appellant at a bar across the street from Prada's gas station (A115). Present was Rodriguez, Prada and the appellant (A115). The appellant indicated the recipient of the drugs, and discussed the payments (A115, A116). The witness and his partner Rodriguez delivered the narcotics to the man the appellant

pointed out (A116, A117). The witness later learned that the name of that recipient was "Oasis Valido" (A117).

CIFRE paid for that delivery in two installments (A117, A118). Thereafter Gonzalez met the appellant at various bars and discussed transactions (A119, A120).

Ultimately Gonzalez arranged another sale with the appellant at the appellant's house; the appellant gave him a $7,000 advance payment (A119). A delivery was later made by Rodriguez to appellant's designee (A119, A120). The appellant paid a $2,000 balance (A120).

B.

Thereafter certain witnesses called by the prosecution testified as to their role in regard to delivering narcotics, and storing it. These witnesses were Noa and Arenas (A60, A71). In the interest of sparing the Court the necessity of re-reading the evidence from these witnesses, counsel respectfully reserves the description of their testimony at that portion of the argument, dealing with multiple conspiracies.

THE DEFENSE

LUIS BUSIGO-CIFRE, a brother of the appellant, testified for the defense (A160a-A160i). He resided in Puerto Rico and described his background as consisting of a college education. The appellant, in the latter part of 1969, procured an apartment in Puerto Rico (A160f). The appellant and the appellant's child were seen by him in June of 1970; he testified that the appellant left Puerto Rico in August of 1970 (A160g).

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SERVE AS A BASIS OF THE VERDICT THAT THE APPELLANT WAS GUILTY OF CONSPIRACY, AND FURTHERMORE, THE GOVERNMENT DID NOT ESTABLISH ONE OVERALL CONSPIRACY AS ALLEGED IN THE FIRST COUNT OF THE INDICTMENT

A.

Since the appellant has been convicted of conspiracy, the appellant appraisal will be a consideration of the evidence in favor of the government. See *Glasser v. United States*, 315 U.S. 60 (1942).

However, since the jury that convicted the appellant for conspiracy acquitted the appellant under the substantive counts, the acts of which may be considered as an object of conspiracy, the verdicts may have been "inconsistent". It is recognized that "inconsistent" verdicts are acceptable as of this date. However, while Glasser was decided in 1942, in 1963 the Supreme Court of the United States in an opinion written by Judge Douglas, 372 U.S. 734 (1963), held at page 738 that:

> "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion' . . ." *Downum v. U.S.* 372 U.S. 734 (1963)

It is further suggested to this Court that since the defendant put in a defense, that defense has to be considered in appraising the sufficiency of the evidence becaube there was more before the

jury that just the testimony of the government's witnesses; see *U.S. v. Frank*, 494 F. 2d 145, (Cert. 2d, 1974), at page 153, this Court stating in part that:

> " . . . When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be imperissible if a defendant had supplied a credible exculpatory version . . . "

See also *U.S. v. Freeman*, June 7, 1974, Cir. 2d Slip Opinion, No. 1050, Docket No. 74-1238.

As was held in *Manley v. United States*, 238 F. 2d 221, (Cir.-6th, 1956) at page 222, where it was stated that:

> "Upon the entire record in the case, the acquittal on count four was inconsistent with the conviction on counts two and three. This alone would not justify reversal. But, when an obviously inconsistent verdict as to different counts of an indictment . . . is returned by the jury, both the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

The theory underlying criminal conspiracy has imported concepts derived from the commercial usages involved in the law of partnership and agencies; see *Pinkerton v. U.S.*, 328 U.S. 640; *Fiswick v. U.S.*, 329 U.S. 111 holding that a conspiracy is a "partnership in crime"; this Court in *U.S. v. Bynum*, 485 F. 2d 490 (Cir. 2d, 1973) on page 495 compared a narcotic conspiracy as to a:

> " . . . more normal business ventures this would be described as a vertically integrated loose-knit combination . . . "

In this case, the appellant's alleged role was that of a purchaser from the government's two principal witnesses who also operated with a co-defendant Ortega. It is fair to say that the government's theory was that the appellant purchased narcotics for resale and occupied a role as a retailer buying from a wholesaler or jobber. However, the jury in acquitting the appellant for the acts involved in the substantive count, apparently rejected this evidence. Be that as it may, it is put that the appellant was not a member of any "partnership in crime" charged in the first count. In *U.S. v. Borelli*, 336 F. 2d 376 (Cir. 2d 1964), a case which is all too familiar in this circuit, this Court viewed a "conspiracy" as essentially an "agreement" and explained that the fact issue as to what the appellant actually agreed to was to be determined by the jury. Counsel for the appellant views this holding as meaning that the issue is not what other parties may have "agreed", or what the master agreement was, or what the other parties intended when they entered the agreement. but what the particular defendant agreed to, or what penal liability and consequences did the particular defendant assume and engage in. See, "THE UNNECESSARY CRIME OF CONSPIRACY", 61 California Law Review, September 1973, page 1137 et. seq. On pages 1148 and 1149 the writer commented as follows:

> " . . . Model Penal Code. Defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement. This semantic change was intended among things, to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he individually agreed to do. . . . "

On page 1150 of that article it was stated that:

" . . . A far better way to determine the scope of one's individual liability for the conduct of another would be to abandon conspiracy altogether with its notions of business enterprises and general partnerships, and look instead to the policy underlying the specific prohibitions at issue . . . "

" . . . But these elementary propositions of business economics have nothing to do with criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise."

The evidence shows that while Ortega enlisted the government's two principal witnesses, to help him market the merchandise, the appellant rather than becoming a member of that organization or a co-partner, independently may have dealt on the two occasions claimed by the government with the two principal witnesses. But in that case, viewing the agreement as to what the appellant may have understood, if he acted, he acted only in regard to the consequences of the conspiracy entered into between the government's two principal witnesses and the co-defendant. Thus, viewed from what the evidence shows the appellant may have "agreed" to or "understood", the arrangement entered into between the two principal witnesses and Ortega was a complete one and that the alleged purchases by him was merely participating in the results of that arrangement rather than participating in a continuing conspiracy viewed from what the appellant may have understood. See *Fiswick v. United States, supra,* 329 U.S. 211, at page 216.

Put another way, the appellant's alleged role at most was that as an "independent" retailer. There is an indication in the record that Prada did not want to deal with the appellant; that

the appellant bargained and tried to get the narcotics directly from the core distributors at a price he wanted. This hardly shows a partnership. Instead it shows competition between a seller and buyer.

In this case, the appellant being placed in the role of a purchaser or retailer is also placed in the role as a partner of those defendants or participants who also bought the narcotics from the core group and is also placed in the role of a partner of the vendors. It is submitted there is a lack of proof that the role assigned to this appellant, by the government, shows that the appellant had any stake in the general narcotic enterprise. Since the government claimed that the appellant bought the narcotics, it would seem that upon each purchase, assuming there were purchases, (the jury acquitted the appellant of this) it would seem that title passed to the appellant as a buyer. Thus after each transaction there being at most two, there was no interest from the point of view of the appellant's understanding or agreement, in the enterprise as such.

It is further submitted that the appellant as a buyer had no stake in the success of the enterprise and hence was not a conspirator. See *U.S. v. Falcone*, 109 F. 2d 579, 581, affirmed 311 U.S. 205; *U.S. v. DiRe*, 159 F. 2d 818, 819 affirmed 332 U.S. 581. Realistically there may have been a conspiracy to sell narcotics. But the mere purchase of a part of the narcotics would not put the buyer in the role of a partner of the wholesalers and a partner of the other buyers. The effect of the inner conspiracy here, was the distribution and the fact that the appellant was claimed to have purchased, would at most make him an exploiter of the consequences of the central agreement or master agreement but not the producing factor of the conspiracy, not a party to the conspiracy, and not an aider or abettor of the conspiracy.

As a matter of fact, that the parties were not acting consistently with each other's interests, is shown by the delinquency in the payments, the acquittal of Echevarria, the bargaining by the appellant shown hereinabove where he stated he would deal with the government's witness, if he could get good terms (A27, A28, A113, A114). In other words and realistically, the appellant as a buyer was not a partner; he had no stake in the successful outcome of the venture. He was not interested in the arrangement as such.

The totality of circumstances in regard to the appellant, rather than being a partner of the others, he was a buyer; a buyer is not a partner of a seller because instead of the interests being consistent, they are conflicting. A buyer wants to buy as cheaply as possible. A seller wants to sell as expensively as possible. This hardly shows a joint enterprise having common interests.

Furthermore, the government attempted to prove, but didn't, that the appellant made two purchases as delineated under the substantive count.

As the Court stated in its charge, the appellant in count 5 was accused of two buys of one-half a kilogram each of the narcotic, the first one being between March 14th and March 23rd, and the second between March and early April (A200). But it is submitted that this was the only evidence against the appellant that had any meaning. If this was the evidence underlying the conspiracy count, it is submitted that the conspiracy count was not established. Because these acts were not accepted by the jury. Furthermore, these acts did not show any "agreement" as envisaged by the law of conspiracy. These acts at most showed that the appellant was a singular participant in the two alleged sales the core conspirators made. Aside from these acts, there was no understanding on the part of the appellant to enter into the conspiracy and wanting it to succeed. In *U.S. v. Katz, et al.*,

271 U.S. 354, (1926), the defendants were charged with a conspiracy. The conspiracy was for an illegal sale of whiskey, the illegality consisting of the defendant's not making a record of such sale. It was indicated by the Supreme Court on page 355 that:

> "The overt act charged in each indictment was the sale of whiskey by one defendant to the other. This is an offense . . . ; but as the defendants in each case were only one buyer and one seller and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of coubtful validity . . . "

It was the very agreement that the government sought to support the conspiracy count that was involved in the substantive count. The substantive count was dismissed because the appellant was acquitted. Furthermore, the appellant, at most, had a slight contact with the core group. As was stated in *Direct Sales v. United States*, 319 U.S. 703, 712, footnote 8:

> " . . . This may be true, for instance, of single or casual transactions, not amounting to a course of business regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase for whatever end. *A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy* . . . " (Emphasis supplied).

As was held by this Court in *U.S. v. Stromberg*, 268 F. 2d 256, (1959) at page 267:

"We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin to Vellucci and Ewing in Hoboken. In U.S. v. Reina, . . . , 242 F. 2d 302 . . . , we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond a single transaction."

In *U.S. v. Aviles*, (Cir. 2d, 1960), 274 F. 2d 179, page 190 it was held that a single purchase was not enough to hold one to be a participant in a conspiracy. As noted in *Direct Sales v. United States, supra*, even more than one transaction is not necessarily sufficient to hold one a participant in a conspiracy in the buying and selling of narcotics or drugs. Because the appellant had at most a minor contact with the core conspirators, did not make him a conspirator. As held in *U.S. v. Cianchetti*, (Cir. 2d, 1963) 315 F. 2d 584, at page 588, this Court stated that:

" . . . but knowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator. There must be something more than 'mere knowledge, approval of or acquiesence in the object of purpose of a conspiracy . . . '. . . This 'something more' is generally

described as a 'stake in the venture'. . . . 'in prosecutions for conspiracy . . . (the defendant's) attitude towards the forbidden undertaking must be more positive . . . He must in some sense promote their venture himself, make it his own, have a stake in its outcome . . . "

In *U.S. v. McKnight*, 253 F. 2d, 817 (Cir. 2d, 1958), it was held that the test of the sufficiency of evidence to support a conspiracy conviction was whether the defendant was indifferent to the outcome of the venture.

Here there was no showing that the defendant had a vital and substantial interest in the enterprise initiated by the core conspirators.

Since the goal of the conspiracy was to violate the statute underlying the substantive count, under which the appellant was acquitted, the appellant couldn't be guilty of a conspiracy which had as its thrust, the acts involved in the substantive count. In *U.S. v. Butler*, (Cir. 10th, 1974), 494 F. 2d, 1246, it was stated that:

". . . It is often observed that in order to be guilty of conspiracy, one must have at least a degree of criminal intent necessary for the commission of the substantive offense. Ingram v. United States, 360 U.S. 672 . . ."

In this case, the appellant was acquitted of committing those acts that were within the contemplation of a conspiracy as described in the indictment herein.

B.

THE GOVERNMENT DID NOT ESTABLISH ONE OVERALL CONSPIRACY:

While it has been argued that the defendant was not a conspirator, appellant is nevertheless constrained to further argue that the government did not establish one overall conspiracy but instead showed multi-conspiracies.

The core conspirators, Ortega, Rodriguez, and Gonzalez, were wholesalers, Behind them were suppliers. Even if this appellant had contact with them, the evidence bears out the defendant was not a partner with the other buyers. There is no evidence in this case that as a retailer who bought from the core group, he also was interested in the outcome of the transactions with other retailers or those who bought from the core group. Thus, there was no agreement between the appellant and the other persons who bought from the core group for a division of profits; nor did the appellant cooperate with the other retailers concerning their operations; nor did he discuss selling methods of the narcotics or how the same could be disposed of by the other retailers or the prices to be charged by them; nor was there any evidentary claim that the appellant made deliveries to another retailer who dealt with the core group. See *Williams v. U.S.*, 218 F. 2d 276, (Cir. 4th, 1954); *U.S. v. Valente*, 134 F. 2d 362, 363, (Cir. 2d 1943) Cert. Denied 319 U.S. 761; *Oliver v. United States*, 121 F. 2d, 245, 248 (Cir. 10th, 1941). Cert. Denied 314 U.S. 666; *Martin v. U.S.* 100 F. 2d 490, 494, (Cir. 10th, 1938); Cert. Denied 306 U.S. 649; *Booth v. United States*, 57 F. 2d 192, (Cir. 10th, 1932).

Thus, the evidence clearly shows that this was a hub and spoke arrangement with the appellant being placed in the role of a buyer but having no relationship to the other buyers. The

government attempted to show through its main witnesses that the appellant agreed to pay part of the debt incurred by Echevarria, but Echevarria was acquitted by the jury. This means that Echevarria was not a member of any conspiracy; see *U.S. v. Cinchetta, supra,* 315 F. 2d, 584, at page 590 where this Court held that because a co-defendant Cinchetta, spoke to a government agent about a member of the conspiracy another appellant, that because this court reversed the conspiracy conviction of Cinchetta, this was not permissible hearsay as being spoken in furtherance of the conspiracy, between a conspirator and a third party.

There was no "rim" concerning the various "spokes" so that the buyers and the core conspirators were in a complete composite arrangement; see *U.S. v. Borelli, supra,* 336 F. 2d, 376. See also *Kotteakos v. United States,* 328 U.S. 750. In that case although each of the arrangements were made with a separate defendant, by the principal mover, and each arrangement had the identical illegal end, since the individual arrangements between the core operator and the other parties were dependent on each other, and because none were aided or had any interest in the success of the other participants, it was held that there were multiple conspiracies rather than a single conspiracy.

It will also be recalled that the government attempted to show that the appellant was a member of an overall conspiracy because of his efforts in adjusting Echevarria's debts. The theory underlying this facet of the evidence was that the appellant therefore knew that Echevarria was engaged in the conspiracy and hence it could be inferred that the defendant was aware of the overall conspiracy. However, it was noted before, Echevarria was acquitted.

There is no claim that the appellant knew the other buyers.

See *Daley v. U.S.*, 282 F. 2d 818, (Cir. 9th, 1960) in regard to the appellant Quinn. The facts in that case were the core members of the conspiracy were stealing narcotics and disposing of them. One of the defendants, Robero, received drugs from the co-conspirators including a key member of the conspiracy; this same defendant also took drugs in the presence of the chief member of the conspiracy and another defendant and was told that the narcotics had been burglarized from a certain drug store. On other occasions Robero had taken drugs with the other co-conspirators. However, in regard to the appellant Quinn his judgment of conviction was reversed because it was not shown he was connected with a single conspiracy. It was held that while Quinn may have conspired with two of the defendants there was nevertheless a failure of proof to prove that those two members were linked up with others in lawfully dispensing narcotics.

In *Rocha v. United States,* 288 F. 2d, 545 (Cir. 9th, 1961) the defendants were charged with a conspiracy in a single count. The scheme was to defraud the United States by having each defendant obtain a preferred immigration status by means of false marriages with United STates citizens. It was held that six conspiracies had been established because each couple was not interested in any marriage but its own. The Court reversed the conviction, even though one of the indicted co-conspirators was a witness at trial and was responsible for all the marriages in question.

See also *U.S. v. Varelli,* 407 F. 2d 735 (Cir. 7th, 1969).

In *U.S. v. Bynum,* 485 F. 2d 490 (Cir. 2d 1973) this Court considered the issue of multiple conspiracies, in regard to a narcotic prosecution on pages 495 and 496. In considering this issue, of a single conspiracy, this Court divided the defendants as a group into the following tiers:

Bynum and Cordovano, were found to have financed the venture and procured the supplies of the raw narcotics; the defendants Birnbaum and other named defendants, noted on page 495, were held to be members of an overall arrangement because they supplied the narcotics and anticipated the resale by the wholesalers at "tremendous" profits.

This Court further considered the defendants named on page 496 of the opinion and these were held to be members of a unitary group because they participated in the processing and distribution of the drugs, understanding the roles of Bynum and his suppliers. By contrast with this case, the facts in Bynum showed a dependency of each group of defendants on the other, all having a common stake in the success of the scheme.

Here the evidence showed that the appellant had no stake in the success of the venture. The core group dealing with the other retailers, were members of an overall conspiracy because this is what they intended. But the retailers it is submitted were not members of one overall conspiracy. See 61 *California Law Review, supra,* at page 1148.

Since a conspiracy is essentially an agreement by holding the appellant circumstanced as he is in this case, the Court below made the appellant responsible for being a party to not only an agreement between himself and the core group, but also a party to the agreements between other defendants. These agreements apparently were added up to total one agreement. Thus, even in the link or chain conspiracy, the links constituting successive agreements, a defendant is held to be a part of the entire group because he apparently agreed each time one of the other members made an agreement with a member other than the immediate defendant. As noted in 72 Harvard Law Review, page 922 et seq., "Developments in the Law of Criminal Conspiracy", (1959), at page 928:

> "Courts generally consider that a person who joins in an existing criminal group becomes a party to the same conspiracy. But if a conspiracy consists of a continuing act of agreement, it is difficult to see how that can be so, since the act of agreement in which an individual participates can not logically begin before he enters or continue after he leaves. In reaching their conclusion therefore, Courts seem to be using the word conspiracy to refer not to a crime, which by definition must be an act, but rather to a group—the body of men who are guilty of the crime of conspiring with one another. . ."

The harmful effects of the joinder herein, and the proof showing multi-conspiracies, is evidenced from the record in this case. Appellant's counsel is sure that counsel for other appellants will show various transactions that are completely unrelated to the appellant's "agreement" but which nevertheless the jury heard. Additionally, however, appellant's counsel is constrained to bring to the attention of this Court the following prejudicial effects of the joinder.

It was self-evident that Rodriguez made sales to others and testified that on one sale he got $19,000 (A38-A40). Rodriguez testified he had several customers (A42). Thus there was a transaction with a co-defendant by the name of Elchino who allegedly made four purchases (A44-A49).

At the price kilos were selling, Rodriguez testified as to other deliveries one of six and a half kilos (A51, A52). The jury heard from this witness also that on a sale to an El Moro, the latter spoke about the interstate transportation of heroin (A54, A55). Rodriguez further testified that he sold twenty kilos (A58).

Another witness named Noa testified that he was involved in heroin dealings and travelled to New York from Florida monthly

where he stayed at about nine or ten apartments, using three of them to store heroin (A60, A61). He testified that he was involved to December 12, 1970 when he was ultimately arrested on five charges (A62). He was allowed to testify as to the various grades or quality of the heroin (A66).

The witness Arenas testified that he was a minister of a religious sect having an African origin (A71). He was the religious godfather of apparently one of the parties who was a source of the heroin (A71, A72). In 1969 this witness operated the store for the sale of religious articles but in 1970 converted it to a shoe store (A72). He was convicted and then cooperated (A73).

Then the jury heard that at the time of trial he was under investigation by the Internal Revenue Service (A73). In January 1970 he testified he learned of a shipment of heroin into the United States at a meeting between two co-conspirators (A73).

He then was allowed to testify that a large shipment of heroin, 60 kilos, was picked up and were ultimately stored at an apartment this witness described as being occupied by children (A76).

POINT II

THE DUE PROCESS CLAUSE UNDER THE 5TH AMENDMENT TO THE FEDERAL CONSTITUTION (WHICH ALSO INCLUDES EQUAL PROTECTION OF THE LAW AS AN ELEMENT TO DUE PROCESS) REQUIRES A REVERSAL OF THE CONSPIRACY CONVICTION.

Recognizing that inconsistent verdicts in a jury trial are proper, see *U.S. v. Zane,* Cir. 2d, Docket No. 73-2041, 73-2450, Slip Opinion, April 1, 1974, page 25, 2502, 2503, the appellant nevertheless asked the Court to consider the propriety of such inconsistencies by a jury. Since the verdict herein was general, it is impossible to ascertain the reasons underlying the jury's verdict in this case that in effect held that the appellant did not commit the substantive acts, but agreed to violate the narcotics laws involved in the substantive count.

Under the usual circumstances of mass narcotics trials where the infamy attached to narcotic trafficking is always before the jury, the multiple defendants, the recounting of the sordid acts and large amounts of money, it would perhaps be consistent with clarity of verdicts, to have adopted the procedure Judge Bauman, a Judge of the District Court, Southern District of New York, did in *U.S. v. Arroyo,* 494 F. 2d 1316 (Cir. 2d 1974). The Court in its opinion specified on page 1318 that:

> ". . . repeatedly Judge Bauman most carefully instructed the jury that evidence as to each of the charges was to be considered seperately in the determination of the guilt or innocence of each participant. He required the jury to indicate by special verdict the degree of involvement if any, by each of the accused and of the association by each

with the objects of the conspiracy if the jury were to find one to exist. . . ." See footnote 7 on page 1318.

It is also to be noticed that while inconsistent verdicts are proper, to date, repugnant verdicts are not. See *People v. Kass*, 74 Misc. 2d 682, otherwise reported in 346 N.Y.S. 2d 641 (Supreme Court, N.Y. Appellate Term, Second Department), at page 643. There it was held that while each count of an indictment is a separate indictment therefore allowing inconsistent verdicts, a ". . . repugnant verdict is one where there has been a finding of guilt on one but not on the other of the two crimes charged in an indictment, each of which has identical elements. . .".

In this case, it is submitted that the purpose of the conspiracy was alleged to be the identical element contained in the substantive count under which the appellant was acquitted. Furthermore, the only evidence submitted against this appellant was the fact that he allegedly made two purchases from the core group. The appellant was held by the jury to be innocent of transacting any buys.

It is submitted that there is more than an inconsistency, but a repugnacy, between the verdict of the jury acquitting the appellant of the acts involved in the substantive count, but convicting him of agreeing to do those very same acts.

Abstractly, a conspiracy and the commission of an act or a substantive act are separate crimes. But the evidence in this case ran more to the substantive acts at'tributed to the appellant than the so-called agreement.

By acquitting the appellant under the substantive count, the jury acquitted the appellant of committing the acts involved in that count. But since the appellant was acquitted of those acts,

the jury also found that the appellant conspired to commit those acts, but didn't. Nor could the appellant be considered to have agreed that the acts would be committed by others, because the grand jury never indicted this appellant on any of the substantive counts involving the other defendants. Under the ruling of this Court in *U.S. v. Cantone*, 426 F. 2d 902 (Cir. 2d, 1971), the appellant could have been charged with the commission of the substantive acts by others, if he were a member of the conspiracy. Ironically, the grand jury never charged the appellant in that respect.

The crucial issue in this phase of the appeal is that if the appellant were tried initially on one count, and acquitted, and were to be thereafter tried on another count, he could successfully have raised an issue of collateral estoppel and/or double jeopardy or even res adjudicata; see *Ashe v. Swenson*, 397 U.S. 436 (1970). See also *Harris v. Washington*, 404 U.S. 55 (1971).

But with the rules of joinder, allowing the government to group multiple defendants and join various counts all in one trial, the advantage is with the government. The choice is theirs, and there is little likelihood of ever procuring a severance especially from the vantage of economy and time.

Under the circumstances, and in view of the general jury verdict, the appellant has been nevertheless denied due process of law under the 5th Amendment and also equal protection of the law. Thus, the law allows the prosecutor to join the counts and the defendants and have one trial. As noted in 71 Colombia Law Review, page 321, in "Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts", these procedures namely the selection of one trial may deprive the appellant of an advantage in having two trials.

Initially, it is respectfully submitted that while the concurring opinion of Mr. Justice Brennan in *Ashe v. Swenson* was directed to the preference of one trial, to obviate double jeopardy, nevertheless this procedure would lead to the situation of a defendant circumstanced as the appellant is. Thus, by compelling the defendant to stand trial on multiple counts, so that he will not be placed in double jeopardy if tried seperately, would be to condition his right to a fair trial because such defendant also has a right to be free from double jeopardy. In other words the affording the defendant one right would constitute a forfeiture of another right. It was noted on page 331 of 71 Columbia Law Review, supra, that the ruling in Ashe may nevertheless undermine the validity of inconsistent criminal verdicts. On page 334 it was stated as follows:

> "It seems altogether possible that the Dunn Rule will not always operate in defendant's favor; an inconsistent acquittal and conviction may be the result of prejudice or confusion for example. Where this is conceivably the case, the rule requires some modification. It also appears somewhat inconsistent with our notions of the jury system to give full weight to a conviction and none to an acquittal when the two are incompatible. . . . Such verdicts place a greater hardship on a defendant who is tried on all possible counts at once than on one who is subject to seperate trials. The latter will not even be tried a second time if he is acquitted for the first time while the former will suffer conviction. Such a result should hardly be justified by invoking the need to preserve jury discretion since it is defendant who is supposed to be protected by that discretion and who will presumably appeal an inconsistent verdict."

In footnote 78 on page 334 supra, it was noted that due process and equal protection considerations are relevant to the situation involving collateral estoppel and inconsistent verdicts.

In appraising the jury's verdict in this case, this Court is respectfully requested to apply the appraisal of the evidence underlying the verdicts as found in *U.S. v. Myerson*, 24 F. 2d 355, (Cir. 2d 1928); *U.S. v. Kramer*, 289 F. 2d 909, (Cir. 2d 1961).

Furthermore, that the due process clause of the 5th Amendment involves equal protection of the law is found in *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). See the concurring opinion of Chief Judge Bazelon in *U.S. v. Fox*, 438 F. 2d 1235, (C.A. D.C., 1970), at page 1239 where it was stated that:

> "The conclusion that inconsistency among jury verdicts on the several counts of a multi-count indictment is acceptable is based in large part upon the premise that such an inconsistency would be tolerated had each count been the subject of a separate indictment and trial. Dunn v. United States, 284 U.S. 390, 393, 52 S. Ct. 189 (1932). Had appellant been tried and acquitted both of petit larceny and attempted larceny, it is clear to me that Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) would not allow a subsequent conviction for burglary to be sustained upon evidence showing the larceny of which appellant had been acquitted. Similarly, if the jury in the present case had been charged with regard to attempted larceny and had returned a verdict of not guilty, I would believe the record squarely presented the question whether the rule of Dunn can survive the erosion of its premise in Ashe. . . ."

POINT III

THE APPELLANT RESPECTFULLY JOINS IN ALL THE ISSUES RAISED BY THE APPELLANTS IN THIS CASE.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

HERMENA PERLMUTTER
Attorney for Defendant-Appellant
Charles Busigo-Cifre

ARNOLD E. WALLACH
On the Brief

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of July , 19 74 at No. Foley Square, N.Y.C. deponent served the within BRIEF upon U.S. Atty. for Southern Dist. of N.Y. the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 11 day of July 1974

Edward Bailey

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975